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Supreme Court of the United States

October Term, 1963

No. 461

HEBBERT APTHEKER, ET AL.,

Appellants,

against

THE SECRETARY OF STATE.

**BRIEF FOR AMERICAN CIVIL LIBERTIES UNION
AS AMICUS CURIAE**

OSMOND K. FRAENKEL,

120 Broadway,

New York, N.Y.,

*Counsel for American Civil Liberties
Union, as amicus curiae.*

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The American Civil Liberties Union is filing this brief, with the consent of the parties, because it believes that this case presents important issues affecting freedom of association and the right to travel.

Appellants question the constitutionality of that portion of the Subversive Activities Control Act which prohibits the issuance of a passport to any member of a Communist organization which has been required to register and even makes it an offense for any such member to use an existing passport or ask for its renewal or the issuance of a new one (50 U. S. C. § 785).

Appellants having exhausted all the administrative procedures set up by the State Department then sued for declaratory judgment. The three judge court ruled against them on the ground that they were shown to be Communists and that Congress had, in 1950, found that travel of Party members was one of the methods used for the furtherance of the Party's revolutionary objectives.

This Court has recognized that the right to travel is part of the liberty protected by the due process clause

(*Kent v. Dulles*, 357 U. S. 116, 125). Infringement of such a basic right is permissible only upon a showing of necessity and may be restricted only by a statute narrowly drawn to meet the need (*Winters v. New York*, 333 U. S. 507; *Smith v. California*, 361 U. S. 147; *Scales v. United States*, 367 U. S. 263; *NAACP v. Button*, 371 U. S. 415).

It needs no elaborate analysis to establish that the statute here under attack is not such a narrowly restricted one. For it sweeps within its wide prohibition every person who, after the order for registration has become final; remains a member of the organization and knows of the existence of the order. There is no requirement of active association with the organization; no limitation on travel to sensitive areas. In effect the statute has created an irrebuttable presumption that every Communist who travels to a country which requires a passport will there engage in some activity dangerous to the security of the United States. (It may be noted in passing that the statute cannot possibly accomplish its supposed objective since there are many countries to which even a Communist may travel without any passport from the United States.)

The scope of the statute, of course, covers much more than just the Communist Party. Its penalties apply to members of both Communist action and Communist front organizations (see 50 U. S. C. § 782 subd. 5). The Subversive Activities Control Board has required a large number of "front" organizations to register and has been sustained by the Court of Appeals for the District of Columbia in a number of instances. If this Court should let those decisions stand the scope of this statute will be immeasurably widened.

In our view, an important aspect of a statute such as this is not only its immediate impact on appellants or others who may be denied passports, but on its indirect impact on freedom of association. We are all aware of the timidity engendered by the excesses of the McCarthy era,

particularly of the pall which fell upon the student body of the country. Young people were made aware of the serious consequences which flowed from associations their elders had made when they were students and were frightened into a conformity harmful to the development of that spirit of independence which has made this country great. Recent developments in the South have stirred the conscience of the young so that there is reason to believe that we are emerging out of the fear which so long prevailed. But there can be no gainsaying that the existence of a statute such as this will contribute to a prolongation of the era of fear and discourage free association.

We should note in passing that the statute impinges on due process because it makes binding on all individuals affected the determination of the character of the organization made in a proceeding to which they were not parties. (See *United States v. Spector*, 343 U. S. 169, Jackson and Frankfurter dissenting at 176ff; Cf. Fraenkel. Can the Administrative Process Evade the Sixth Amendment, 1 Syracuse L. Rev. 173.)

For all these reasons we respectfully submit the statute should be declared unconstitutional.

Respectfully submitted,

OSMOND K. FRAENKEL,

120 Broadway,

New York, N. Y.,

*Counsel for American Civil Liberties
Union, as amicus curiae.*